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No. 91-

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1991

JERRY SPAN AND DARLENE SPAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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QUESTIONS PRESENTED

Whether, in a prosecution for assault on a federal officer engaged in his official duties, a jury instruction may bar acquittal based upon the officer's use of excessive force.

Whether the standard for determining plain error when an erroneous instruction is given differs from that for failure to give a requested instruction.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JERRY SPAN and DARLENE SPAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jerry Span and Darlene Span petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming their criminal convictions in the United States District Court for the District of Arizona.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a - 34a) is reported at 970 F.2d 573.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1992. A timely petition for rehearing was denied on December 3, 1992. The jurisdiction of

this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

Section 111 of Title 18, U.S.C., provides in relevant part: "Whoever . . . forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties, . . . shall be fined under this title or imprisoned not more than three years, or both."

STATEMENT

In this criminal case, the court of appeals approved a jury instruction that effectively directed a verdict on the factual issue of whether or not the federal officers allegedly assaulted were

engaged in performance of their official duties at the time of the arrests, an element of the offense. In addition, although the court of appeals held that the instructions given precluded acquittal even if the jury found that petitioners used reasonable force to repel excessive force by a federal officer, it held that these instructions did not amount to plain error, because the error was "tantamount to refusing an instruction" on the defense raised. Petitioners seek review of those holdings.

1. The facts underlying the petitioners' claims are set forth in the court of appeals' opinion. On April 7, 1988, two deputy United States Marshals ("the marshals") were seeking a 70 year old fugitive named Mickey Michael pursuant to an eight year old warrant. Based upon a lead they had received, the marshals drove to an address in Phoenix where they believed he might be located. They wore plain clothes and drove in an unmarked car. Pet. App. at 4a.

As the court of appeals observed, "the rest of the story is hotly

disputed." Pet. App. at 4a. According to the marshals, Darlene Span met them as they got out of their car, and after looking at a wanted flyer with Michael's picture on it, she took it from the marshal's hand and walked away with it. The marshals testified that one of them blocked her path and told her she could not make a copy of the flyer, and that at about that time, Jerry Span approached the marshal and told him to leave his property. One marshal testified that he identified himself as a federal agent, and that Jerry Span hit him in the chest. According to the government, Darlene Span attacked the other marshal from behind and clawed at his face. That marshal testified that as he attempted to handcuff Ms. Span against a car, she raised up on her toes and sat back down toward him, sitting on his knee. Pet. App. at 4a.

Petitioners told a very different story. They testified that Darlene Span politely greeted the marshals, who did not identify themselves as federal officers. When Ms. Span was asked if she recognized the man in the flyer, she said

that although she had a brother named Mickey Michael, she had never seen the man depicted. Her brother is about 30 years younger than the man in the flyer. Mr. Span also told the marshals that he did not recognize the man. They handed the flyer back to the marshals and attempted to return to their customers. Defense witnesses testified that one of the marshals ran up to Ms. Span as she walked away, grabbed her from behind by the hair, locked his arm over her head, and dragged her into a fence. Meanwhile, the other marshal tackled Jerry Span from behind and held him to the ground, administering painful chokeholds for about ten minutes. A witness at the scene called the Phoenix police, who helped arrest the Spans. Pet. App. at 6a-7a.

After a five day jury trial, petitioners were convicted of assaulting a federal officer in violation of 18 U.S.C. § 111.

2. At the close of the evidence at trial, the district court instructed the jury that "[f]ederal officers engaged in good faith and colorable performance of

their duties may not be forcibly resisted , even if the resistor turns out to be correct, that the resisted actions should not, in fact, have been taken. The statute requires him to submit peaceably and seek legal redress thereafter." Just before giving this instruction, the district court instructed the jury that "[a] deputy United States Marshal who is investigating leads in connection with a fugitive or trying to arrest a person is engaged in his official duties." Pet. App. at 25a. Petitioners properly objected to the instruction and thereby preserved the issue for appellate review.

3. The court of appeals held that the "preferred course would have been to submit to the jury the question whether [the marshals] were engaged in official duties," but rejected petitioners' contention that the instructions given directed a verdict on the issue. Pet. App. at 26a. The court of appeals held that the instruction "states only that the activity of looking for a suspect is official conduct," and concluded that the instruction accurately characterized the

marshals' conduct "when they approached the Spans." Pet. App. at 26a-27a. The court of appeals ignored the second half of the instruction which provided that "trying to arrest a person" was, by definition, within a federal officer's official duties, regardless of how the arrest was accomplished.

4. In addition to the instruction above, the district court refused to give the Spans' requested general self-defense instruction, and instead gave a modified version of Ninth Circuit Model Instruction 8.02B in its place, which provided as follows:

> In addition to proving all the elements of the crime beyond a reasonable doubt the government must also prove beyond a reasonable doubt either (1) that the defendants knew that [the marshals] were federal officers or (2) that the defendants did not reasonably believe force was necessary to defend against an immediate use of unlawful force or (3) that the defendants used more force than appeared necessary in the circumstances.

Pet. App. at 9a. The disjunctive language required the jury to convict petitioners if they found that the Spans

knew that the marshals were federal officers, regardless of whether or not the officers used excessive force.

5. The court of appeals agreed with petitioners that the instruction given was erroneous, since it "requires the jury to reject [the theory of self-defense against excessive use of force by a federal law enforcement officer] as long as the government proves beyond a reasonable doubt that the defendant knew that the person she is charged with assaulting was a federal law enforcement officer." Pet. App. at 11a. The court of appeals nevertheless held that the instruction given was not plain error because it was "tantamount to refusing an instruction based on the defendant's right to use reasonable force to repel excessive force by a law enforcement officer." Pet. App. at 11a. The court of appeals held that petitioners did not present that defense, but instead presented a general self-defense case predicated upon their belief that the marshals were private citizens.

REASONS FOR GRANTING THE PETITION

The court of appeals made several legal errors that are of continuing significance to the fair and consistent administration of the criminal laws. First, the court of appeals approved instructions that directed a verdict on the issue of whether or not the federal officers were engaged in the performance of their official duties at the time of the alleged assault. This was not only an issue of fact for the jury, but also an element of the offense, and there was ample evidence in the record to permit a jury finding contrary to the mandatory language of the instruction. Moreover, this Court has recognized the right of an individual to offer reasonable resistance to the use of excessive force even in the course of a lawful arrest. Instructions that foreclose such a defense should be deemed reversible error. Second, the court of appeals considered an additional erroneous jury instruction (which required the jury to convict if it found that the Spans knew that the two men were federal officers) as equivalent to a

failure to give an instruction for purposes of plain error analysis. The Court of Appeals for the Ninth Circuit has acknowledged in other cases that this is not so; instead, it has not yet resolved the appropriate standard for review of the refusal to give an instruction, and has distinguished this type of error from an instruction, actually given, that misstates the law. Finally, in evaluating the impact of the instructions it deemed incorrect, the court of appeals erroneously distinguished between the defense of self-defense and that of resistance to excessive force in order to conclude both that petitioners had not preserved the instructional issue and that the flaw did not rise to the level of plain error. Each of these issues merits review by this Court.

I. IN A PROSECUTION UNDER 18 U.S.C. § 111, JURY INSTRUCTIONS MAY NOT DIRECT A VERDICT ON THE ISSUE OF A FEDERAL OFFICER'S USE OF EXCESSIVE FORCE.

The court of appeals has approved a jury instruction that took away from the jury the determination of a critical

element of the charged offense. Pursuant to 18 U.S.C. § 111, a federal officer is protected against assaults, resistance, impediments, intimidation, or interference only if they occur "while [the officer] is engaged in or on account of the performance of official duties." The factual issue of whether or not federal officers -- here, the marshals -- are actually so engaged is for the jury, particularly where, as here, that issue of fact is an element of the offense and a predicate to criminal liability.

Here, however, the district court permitted an instruction that defined official duties in such a way as to direct a verdict on the question of whether the marshals were engaged in the performance of them. The district court never advised the jury of petitioners' right to resist the use of excessive force, but instead instructed that "[a] deputy United States marshal who is investigating leads in connection with a fugitive or trying to arrest a person is engaged in his official duties." Pet. App. at 25a (emphasis added). Thus, the court foreclosed consideration of a

central issue in this case, and in many other cases under 18 U.S.C. § 111: whether the marshals used excessive force in their efforts to arrest not Mickey Michael but Jerry and Darlene Span.

Under the instructions approved by the court of appeals, the Los Angeles Police officers who beat Rodney King would have been "engaged in the performance of their official duties," simply by virtue of their "trying to make an arrest." In addition, no jury could have acquitted Rodney King of a charge of resisting those officers' attacks, had he been so charged.[1]

As the court of appeals noted, under the Fourth Amendment, an individual has the right to be free from the use of excessive force by a law enforcement officer "even when that officer is making a lawful arrest." Pet. App. at 11a-12a n.3, citing Graham v. Connor, 490 U.S. 386, 394-96 (1989) ("[A]ll claims that

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1. This analogy hypothesizes that Mr. King's attackers were federal officers and that § 111 applied to them.

law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach"); Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment"). In a prosecution under 18 U.S.C. § 111, this right to be free of excessive force is negated by a jury instruction that precludes acquittal even where such force is used.

Contrary to the court of appeals' holding that "[t]he instruction states only that the activity of looking for a suspect is official conduct," Pet. App. at 26a-27a, the instruction on this issue said much more. The language that violated petitioners' rights under both the Fourth Amendment and the Fifth Amendment's due process clause was that which dictated that marshals "trying to make an arrest" are, as a matter of law,

also engaged in the performance of their official duties. By its terms, this portion of the instruction directed a verdict on the issue of whether or not the officers were engaged in performance of their official duties during their confrontation with petitioners.[2]

The instruction directed the jury to conclude that, no matter how the marshals tried to arrest petitioners -- even if they did so by means of excessive or unlawful force in contravention of their Fourth Amendment rights -- they were still acting within their official duties. In combination with the instruction that "[f]ederal officers engaged in good faith and colorable

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2. The language established conclusively, and erroneously, that at both the inception and the conclusion of the encounter, the officers were engaged in the performance of their official duties, without giving the jury any indication that they were free to decide that the conduct in between was not. Moreover, the instruction forced the jury's hand as to the crux of the case, which was whether petitioners responded reasonably to the marshals' use of excessive force while "trying to arrest a person."

performance of their duties may not be forcibly resisted even if the resistor turns out to be correct, that the resisted action should not, in fact, have been taken," the instruction regarding arrest prevented the jury from acquitting petitioners on a theory supported by the law and the evidence. Moreover, the grammar of the instruction addressing "good faith" was conclusory and did not present any issue for the jurors, but instead told them that, definitionally, the marshals were acting in good faith. As in Carella v. California, 491 U.S. 263, 266 (1989), "these mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offense[]" with which the Spans were charged, and reversal is warranted.

A number of circuits have recognized that "a federal officer acting outside the scope of official duty is not entitled to the protections of section 111." Pet. App. at 22a, citing United States v. Danehy, 680 F.2d 1311, 1316 (11th Cir. 1982) (per curiam) ("there may

be some residual role for the common law right [to resist] where it appears that the arresting officer is engaged in a 'frolic of his own'"); United States v. Martinez, 465 F.2d 79, 82 (2d Cir. 1972). In particular, courts of appeals have recognized the right of resistance as a defense to a prosecution under 18 U.S.C. § 111. See United States v. Frizzi, 491 F.2d 1231, 1232 n.2 (1st Cir. 1974); United States v. Kartman, 417 F.2d 893, 896 (9th Cir. 1969); United States v. Grimes, 413 F.2d 1376, 1378-79 (7th Cir. 1969); United States v. Wallace, 368 F.2d 537 (4th Cir. 1966), cert. denied, 386 U.S. 976 (1967). In order to give meaning to this right, and to define its contours, this Court should grant the application for a writ of certiorari.

II. MISINSTRUCTION ON THE LAW IS NOT TANTAMOUNT TO REFUSAL OF A REQUESTED INSTRUCTION; IT SHOULD NOT BE REVIEWED FOR ERROR IN THE SAME WAY

The district court compounded the gravity of the error set forth above when it erroneously instructed the jury that the government needed to prove "either" that petitioners knew that the two men

were federal officers "or" that petitioners did not reasonably believe that force was necessary to defend against immediate use of unlawful force. Pet. App. at 9a. As above, this language foreclosed the defense -- supported by evidence in the record -- that petitioners used reasonable force to repel the officers' excessive force.

Although the court of appeals acknowledged this much, holding that the instruction given erroneously required the jury to reject an excessive force defense "as long as the government proves beyond a reasonable doubt that the defendant knew that the person that she allegedly assaulted was a federal law enforcement officer," Pet. App. at 11a, it nevertheless affirmed petitioners' convictions.

The court of appeals reasoned that misinstruction was "tantamount to refusing an instruction based on the defendant's right to use reasonable force to repel excessive force by a federal law enforcement officer." Pet. App. at 11a. The court should not, however, have applied the plain error standard as if

there were simply an error of omission; an instruction was in fact given and it was incorrect.

The court of appeals for the Ninth Circuit has noted the substantial ambiguity in the law as to the appropriate standard of review of the refusal to give an instruction, although it applies a de novo standard to misstatements of the law. United States v. Streit, No. 90-10509 (9th Cir. May 19, 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 431 (court "has not yet resolved the question whether a district court's denial of a proposed jury instruction is reviewed for errors of law, sometimes characterized as 'de novo,' or for an abuse of discretion," although "[a]n assertion that the trial court's instructions to the jury misstated the elements of the crime does present a question of law subject to de novo review"), citing cases. The court of appeals' analogy to a refusal to instruct suggests that it applied the narrower 'abuse of discretion' standard to the flawed instruction. The proper standard is that set forth in United States v.

Smith, 891 F.2d 703, 709 (9th Cir. 1989), cert. denied, ___ U.S. ___, 111 S. Ct. 47 (1990), which held that an instruction that misdescribes the elements of an offense may be deemed harmless error only "if no rational jury could have found defendants guilty under the erroneous instruction and not also found them guilty under the correct instruction".[3]

Moreover, as a simple matter of logic, it is far more prejudicial to instruct a jury that it must convict under circumstances that warrant acquittal, than to simply remain silent on the issue. While a correct instruction might have resulted in an acquittal, so that failure to give the instruction might decrease that probability, the erroneous instruction actually stood as an insurmountable obstruction to acquittal. Accordingly, the harmlessness of such an error should

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3. In Smith, there was no objection to the erroneous instruction. Nevertheless, this standard was applied to determine whether the error was "manifest." 891 F.2d at 709.

be subject to a different standard of review whether the issue has been preserved or is being evaluated for plain error.[4]

The court of appeals then held that the instructions did not rise to the level of "plain error" in part because "the Spans' assertion of self-defense at trial did not establish sufficient foundation for an instruction on an excessive force theory of defense." Pet. App. at 16a.

This conclusion overlooked at least two important points: first, a jury instruction is proper so long as it is supported by evidence in the record; that evidence may be offered by either the government or the defense. Here, the government's case was that the marshals

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4. Petitioners maintain, as they did below, that they did, in fact, preserve the issue of their entitlement to an instruction on the defense of reasonable resistance to excessive force when they requested a self-defense instruction that specifically included the right to resist "unlawful" force, a term which necessarily encompasses "excessive" force.

identified themselves as federal officers, while petitioners and other defense witnesses denied that they were aware of the official status of the men who attacked them. Accordingly, a jury could have concluded on this record that the marshals did identify themselves, but that they also used excessive force. Since the court of appeals acknowledged that the instruction precluded acquittal on that theory, it did amount to plain error.

Moreover, the court of appeals recognized that Petitioners "offered evidence of having acted in self defense." Pet. App. at 9a. It nevertheless concluded that this evidence was inadequate to support a correct instruction on excessive force, stating in a footnote that "[t]he elements of a general right of self-defense do overlap with those of a more narrowly defined right of self-defense against excessive force, but they also differ in important ways." Pet. App. at 16a n.5 (emphasis added). The court of appeals did not explain in what ways these defenses

differ.[5] Surely they cannot differ to the degree implicit in the court of appeals' holding: that the right of self-defense is cut off completely if the individual defended against is a federal officer, or that the right to resist excessive force is cut off completely if the defendant does not know that the

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5. The court of appeals noted only that "the type of self-defense asserted against the use of excessive force typically involves an arrest" and that the arrestee who later asserts an excessive force defense "in all likelihood knew that her alleged assailant was a federal law officer." Pet. App. at 16a n.5 (emphasis added). These observations are not, even in the court's view, applicable to every § 111 case, and therefore do not serve to distinguish the two defenses.

Despite the court of appeals' characterization of them as "important," the illustrations given do not demonstrate that a reasonably competent attorney, let alone a juror hearing the confused instructions given by the district court, was on notice of, and able to make these distinctions. Yet, the court of appeals used this "difference" to conclude that petitioners had not been harmed by instructions which admittedly precluded acquittal on a viable theory of the case.

excessive force is wielded by a federal officer rather than a private citizen.[6]

Significantly, those cases recognizing the right to resist the use of excessive force by a law enforcement officer do not make the distinction discussed above, but instead use the language of general self-defense. See, e.g., United States v. Wallace, 368 F.2d at 538 ("[18 U.S.C. § 111] does not proscribe reasonable force employed in a justifiable belief that it is exerted in self-defense"). See also United States v. Martinez, 465 F.2d at 82 & n.*

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6. Significantly, in United States v. Feola, 420 U.S. 671 (1975), this Court held that under 18 U.S.C. § 111, proof of a defendant's knowledge that the intended victim of an assault was a federal officer is not necessary for a finding of guilt: "[a]ll the statute requires is an intent to assault, not an intent to assault a federal officer." Id. at 684.

It follows, then, that just as a defendant need not be shown to have knowledge of a federal officer's status in order to be convicted, he need not himself show knowledge of that status in order to assert a right of reasonable resistance -- self-defense -- to the use of excessive force by that officer.

(recognizing that "use of reasonable force in self-defense might be justified when one is resisting unlawful arrest by an officer . . . " and noting that lack of scienter of an agent's official status is "crucial in a situation involving unlawful arrest by agents"); United States v. Grimes, 413 F.2d at 1379 (under 18 U.S.C. § 111, "defendant was privileged to intervene in defense of one whom he reasonably thought to be the victim of an unauthorized and unprovoked physical assault by prison officials to the same extent that the victim of the alleged assault was privileged to defend himself").

Moreover, courts of appeals have recognized the appropriateness of a general self-defense instruction where the alleged victim is a federal officer. See, e.g., United States v. Streit, No. 90-10509 (9th Cir. May 19, 1992) (refusing general self-defense instruction not because the complaining witness was a federal officer, but because the facts did not support the instruction); United States v. Gometz, 879 F.2d 256 (7th Cir. 1989), cert.

denied, 493 U.S. 1033 (1990) (instruction given). Plainly, then, such a defense is consistent with a charge under 18 U.S.C. § 111, and the district court's refusal to give the requested self-defense instruction was reversible error. When coupled with the instruction that misstated the law, it amounted to plain error.

The petition should be granted to address the issue of the relationship between the general defense of self-defense and the particular defense of reasonable resistance to excessive force, as well as to address the issue of the standard for evaluating plain error where an instruction misstates rather than merely omitting an instruction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 7, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-10284, No. 90-10285

(Argued and submitted October 10, 1991; Decided July 8, 1992)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JERRY SPAN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DARLENE SPAN,
Defendant-Appellant.

Before: Otto R. Skopil, Jr., Harry Pregerson, and Diarmuid F. O'Scannlain, Circuit Judges.

Appeal from the United States District Court for the District of Arizona. D.C. No. CR-89-00284-RCB. Robert C. Broomfield, District Judge, Presiding.

Alan M. Dershowitz, Cambridge, Massachusetts, for the defendants-appellants.

Janet L. Patterson, Assistant United States Attorney, Phoenix, Arizona, for the plaintiff-appellee.

PREGERSON, Circuit Judge:

Jerry and Darlene Span, brother and sister, appeal their convictions following a jury trial of assault on a federal officer in violation of 18 U.S.C. § 111 (1988).[1]

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1. Section 111 reads, in pertinent part: "Whoever . . . forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties, . . . shall be fined under this title or imprisoned not more than three years, or both." 18 U.S.C. § 111.

We grant the Spans' request to expunge the references to 18 U.S.C. § 1114 (1988) in their convictions to avoid any inference that they were convicted for both offenses. See Potter v. United States, 691 F.2d 1275, 1281 (8th Cir. 1982) ("Because of the possibility that the judgment allows an inference that two offenses were committed, the enumeration of both statutes [18 U.S.C. §§ 111 and 1114] in the judgment was improper . . . [T]he reference to 18 U.S.C. § 1114 should be

On appeal, the Spans contend that the trial court made several errors when instructing the jury. While in theory some of the Spans' legal arguments may have merit, we do not find plain error in the district court's jury instructions in light of the evidence presented by the defense. The Spans also contend that the trial court erred when it refused to grant their motion to dismiss the indictment on the ground that the government destroyed evidence. We disagree, and affirm the district court's decision denying the motion to dismiss. Finally, the Spans argue that their convictions must be reversed because the government failed to comply with the requirements of the Jencks Act, 18 U.S.C. § 3500 (19898), and of Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). We do not find that the district court's rulings on these

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(footnote cont'd)

expunged . . ."). Section 1114 defines the offense of killing a federal officer and also defines the class of persons protected by section 111. The Spans did not kill the marshals, and therefore did not violate section 1114.

issues were clearly erroneous. Accordingly, we affirm the Spans' convictions.

BACKGROUND

This case began when deputy U.S. Marshals Garry Grotewold and David Dains ("the marshals") were seeking a 63 year-old escaped fugitive named Mickey Michael, who they believed to be armed and dangerous. On April 7, 1988, the marshals drove to an address in Phoenix, Arizona where, according to a lead, Michael might be hiding. The marshals wore plain clothes and drove an unmarked car. Each carried a gun.

The rest of the story is hotly disputed. According to the marshals, Darlene Span met the marshals almost immediately after they got out of their car. The marshals testified that they told Ms. Span that they were looking for Mickey Michael and handed her a wanted flyer with Michael's picture. Ms. Span told them that the Mickey Michael she knew was out of town and that he was not the man in the wanted picture. Ms. Span then allegedly took the flyer from Marshal Dains and began to walk away.

Marshal Grotewold walked past Ms. Span and blocked her path by resting his arm against a truck. When Grotewold asked her what she was doing, Ms. Span responded that she was going to make a copy of the flyer. Grotewold told her she could not make a copy, and took the flyer from her. About that time, Jerry Span, Darlene's brother, approached Grotewold and demanded that the marshals leave his property.

Grotewold testified that he told Mr. Span that they were federal agents. Mr. Span allegedly hit Grotewold in the chest. Grotewold responded by pushing Mr. Span back and warning him that he had no business in the matter. Grotewold testified that he felt something at his waistband and thought that Mr. Span was trying to take the marshal's gun. Grotewold struck Mr. Span with his arm and told him that he was under arrest.

Marshal Dains attempted to handcuff Mr. Span. Meanwhile Darlene Span allegedly attacked Dains from behind and clawed at his face. Dains moved Ms. Span onto a car to make it easier to handcuff her. Ms. Span jumped down onto Dains' leg, causing a loud pop and a great deal of pain in his knee.

A witness at the scene called the local Phoenix police, and the officers helped arrest the Spans. Phoenix police then took the Spans to Maricopa County Jail for booking. Both marshals suffered injuries.

The Spans tell a different story, and presented testimony from two witnesses to support their version. The witnesses were customers of the Spans' building supply business. Both were near the fracas from the time it began.

Defense witnesses testified that Ms. Span greeted the officers politely and asked if she could help them. According to their testimony, the marshals did not identify themselves. Rather, the marshals simply asked Ms. Span if she recognized the man in the wanted flyer. Ms. Span purportedly told them that she had a brother named Mickey Michael, but that she had never seen the man in the wanted photo. Apparently, Ms. Span's brother is about 30 years younger than the man pictured on the flyer. The witnesses testified that Mr. Span also told the marshals that he had never seen the man in the picture. According to defense

testimony, the Spans handed the photo back to the marshals and attempted to return to their customers without at any time assaulting either Grotewold or Dains.

Defense witnesses testified that Marshal Dains ran up to Ms. Span as she walked away, grabbed her from behind by her pony-tail, locked his arm over her head, and dragged her in this manner into a fence. At the same time, Grotewold tackled Mr. Span from behind, and held him to the ground. According to defense testimony, the marshals held the Spans in painful "chokeholds" for about ten minutes until Phoenix police officer Bill Jenkins arrived.

After a five-day jury trial, the Spans were convicted of assaulting a federal officer in violation of 18 U.S.C. § 111. The Spans are presently released on their own recognizance.

DISCUSSION

I. Jury Instructions

The Spans assert that the trial court made several errors when instructing the jury on defenses to the charge of assaulting a federal officer under 18 U.S.C. §

111. First, the Spans contend that the district court erred by refusing to give their general self-defense instruction and giving Ninth Circuit Model Instruction 8.02B in its place. Second, the Spans contend that the district court erred by refusing to give an instruction on the right to resist an arrest not supported by probable cause. Third, the Spans contend that the district court improperly directed the jury to find that the marshals were acting in performance of official duties.

A.

1.

The Spans argue that the district court erred when it gave the Ninth Circuit model instruction on defenses to section 111 in place of the general self-defense instruction offered by the Spans.[2] Ac-

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2. The Spans offered the following general self-defense instruction based on Ninth Circuit Model Instruction 6.05 (West 1989): "The defendants have offered evidence of having acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force."

cording to their argument, Ninth Circuit Model Instruction 8.02B was given erroneously because it forecloses acquittal even in cases where a jury could find that a defendant used only reasonable force to repel excessive force used by federal law enforcement officers.

The district court gave the following modified version of Ninth Circuit Model Instruction 8.02B (West 1989):

> The defendants have offered evidence of having acted in self-defense. It is a defense to the charge as to a particular defendant if (1) that defendant did not know that Garry Grotewold and David Dains were federal officers (2) that defendant reasonably believed that use of force was necessary to defend oneself against an immediate use of unlawful force and (3) that defendant used no more force than appeared reasonably necessary in the circumstances.
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> * * *
>
> In addition to proving all the elements of the crime beyond a reasonable doubt the government must also prove beyond a reasonable doubt either (1) that the defendants knew that Garry Grotewold and David Dains were federal officers or (2) that the defendants did not reasonably believe force was necessary to defend against an immediate use of unlawful force or (3) that the defendants used more force than appeared reasonably necessary in the circumstances.

(emphasis added).

This instruction correctly states an affirmative defense to section 111 that the Supreme Court set out in United States v. Feola, 420 U.S. 671, 684, 43 L. Ed. 2d 541, 95 S. Ct. 1255 (1975). In Feola, the Supreme Court held that, in certain situations, knowledge of the officer's official status was not an element of the offense. Id. The Court added, however, that "an honest mistake of fact [about the victim's identity as a federal officer] would not be consistent with criminal intent." Feola, 420 U.S. at 686.

In Feola, the Court was not presented with a situation involving alleged use of excessive force by a federal law enforcement officer. The Spans argue that the model instruction based on Feola can actually preclude acquittal based on an excessive force theory of defense. We agree.

According to the plain terms of the model instruction, the jury could not acquit the Spans on grounds of self-defense even if the jury: 1) believed that the exercise of force by Marshals Dains and Grotewold was unlawful because it was excessive, and 2) found that the Spans rea-

sonably defended themselves from that unlawful exercise of force. The revised model instruction given by the district court allows the government to defeat an excessive force theory of defense merely by proof beyond a reasonable doubt that the defendant knew that the person that she allegedly assaulted was a federal law enforcement officer.

We agree with the Spans that the model instruction would be inappropriate in a case where a defendant's theory of the case is self-defense against the use of excessive force by a federal law enforcement officer. As the Spans point out, the model instruction requires the jury to reject this theory of defense as long as the government proves beyond a reasonable doubt that the defendant knew that the person she is charged with assaulting was a federal law enforcement officer.

As such, giving the model instruction is tantamount to refusing an instruction based on the defendant's right to use reasonable force to repel excessive force by a federal law enforcement officer.[3] The

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3. Under the Fourth Amendment, an individual has the right to be free from the use of excessive force by a law enforce-

Spans offered no such instruction, however, and did not object to the district

(footnote cont'd)

ment officer even when that officer is making a lawful arrest. Graham v. Connor, 490 U.S. 386, 394-96, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) ("[A]ll claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.") (original emphasis omitted); Tennessee v. Garner, 471 U.S. 1, 7, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) ("[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment"); Curnow v. Ridgecrest Police, 952 F. 2d 321 (9th Cir. 1991); Reed v. Hoy, 909 F. 2d 324, 329 (9th Cir. 1989) (applying Graham), cert. denied, ___ U.S. ___, 111 S. Ct. 2887, 115 L. Ed. 2d 1053, 111 S. Ct. 2887 (1991). Other circuits and numerous states acknowledge this right of self-defense. See, e.g., United States v. Frizzi, 491 F. 2d 1231, 1232 n. 2 (1st Cir. 1974) ("We of course do not suggest that self defense against unreasonable `standing up' for [the officer's own] authority...would subject the resister to liability under 18 U.S.C. § 111."); United States v. Wallace, 368 F. 2d 537, 538 (4th Cir. 1966) (section 111 "does not proscribe reasonable force employed in a justifiable belief that it is exerted in self-defense"), cert. denied, 386 U.S. 976, 18 L. Ed. 2d 136, 87 S. Ct. 1169 (1967); Dag E. Ytreberg, Right to Resist

court's decision to give Ninth Circuit Model Instruction 8.02B in place of the Span's general self-defense instruction. Accordingly, we review the district court's decision to give the model instruction for plain error. See Fed R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."); Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Plain error arises only in exceptional circumstances where we find that the trial court's decision affected substantive rights and where it is "highly probable that the error materially af-

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(footnote cont'd)

Excessive Force Used in Accomplishing Lawful Arrest, 77 A.L.R. 3d 281 (1990) (citing cases).

fected the verdict." United States v. Armstrong, 909 F. 2d 1238, 1244 (9th Cir.) (quoting United States v. Kessi, 868 F. 2d 1097, 1102-03 (9th Cir. 1989), cert. denied, ___ U.S. ___, 111 S. Ct. 191, 112 L. Ed. 2d 153 (1990).

We do not find plain error in the district court's failure to instruct the jury on an excessive force theory of defense. The Spans offered no such instruction, and they did not rely on this theory of defense at trial.

In presenting their case to the jury, the Spans characterized their actions as those of private citizens defending themselves from attack by others they thought to be private citizens. In this respect, the Spans emphasized two facts in their defense. First, the Spans asserted that they were victims of an unprovoked attack initiated by Grotewold and Dains. Second, the Spans emphasized that they did not know that Grotewold and Dains were federal marshals. The general self-defense instruction offered by the Spans reflects the type of case presented to the jury by defense counsel.[4]

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4. For the text of this instruction, see

Although the facts of this case could have been presented to correspond with an excessive force theory of defense, the Spans did not present such a case at trial. We conclude that the district court did not commit plain error by failing to offer sua sponte an instruction on an excessive force theory of defense not raised during trial.

The Spans assert that they did propose an instruction on excessive force because the general self-defense instruction that they offered was broad enough to encompass an excessive force theory of defense. During the district court's conference with counsel on jury instructions, defense counsel asserted that one of its theories of defense was that the Spans defended themselves reasonably from excessive force used by the marshals.

An assertion made by defense counsel in chambers about their theory of defense is not the same as presenting a case to the jury based on that theory. The dis-

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(footnote cont'd)

Footnote 2, supra.

trict court must still decide whether the case presented at trial supports giving an instruction based on a particular theory of defense. See Kessi, 868 F. 2d at 1103 (a defendant is entitled to any theory of defense instruction that is supported by law and by the evidence presented at trial) (citing United States v. Sommerstedt, 752 F. 2d 1494, 1496 (9th Cir.), cert. denied, 474 U.S. 851, 88 L. Ed. 2d 123, 106 S. Ct. 149 (1985)).[5]

The Spans' assertion of self-defense at trial did not establish sufficient foundation for an instruction on an excessive force theory of defense. Similarly, the general self-defense instruction offered by the Spans does not amount to a

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5. The elements of a general right of self-defense do overlap with those of a more narrowly-defined right of self-defense against excessive force, but they also differ in important ways. For example, the type of self-defense asserted against the use of excessive force typically involves an arrest. The arrestee who later asserts that she did not violate section 111, but rather defended herself from the use of excessive force in all likelihood knew that her alleged assailant was a federal law officer.

proposed instruction on the right to offer reasonable resistance to repel any excessive force used by federal law enforcement officers.

2. The Spans also argue that giving Model Instruction 8.02B is error because it does not tell the jury to acquit if it finds that the government has not met its burden of proof. On appeal, we review jury instructions "to determine whether, taken as a whole, they mislead the jury or state the law incorrectly to the prejudice of the objecting party." Reed v. Hoy, 909 F. 2d 324, 326 (9th Cir. 1989) (citation omitted). In this case, however, we review the Spans' claim for plain error because the Spans' counsel failed to object to the instruction on these grounds. See Fed. R. Crim. P. 52(a) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict...").

We do not find plain error in the district court's instruction on the

grounds asserted here. The model instruction clearly imposes the burden of disproving self-defense on the government. The implication is fairly obvious that the jury must acquit if the government fails to meet that burden.

Furthermore, the district court gave a general instruction on the presumption of innocence wherein the jury was told specifically that: "The government has the burden of proving every element of the charge beyond a reasonable doubt. If it fails to do so, you must return a not guilty verdict." After defining reasonable doubt, the district court again instructed the jury that: "If after a careful and impartial consideration with your fellow jurors of all the evidence, you are not convinced beyond a reasonable doubt that a defendant is guilty, it is your duty to find that defendant not guilty."

We do not see how, in the circumstances of this case, plain error could be found in the absence of a third reminder to the jury of its duty to acquit if the government fails to meet its burden of proof. Where, for example, the Tenth Cir-

cuit reversed a conviction under section 111 based on such an error, it found the text of the instruction "so ambiguous that it could permit the jury to infer that the burden is on the defendant [to prove self-defense]." United States v. Corrigan, 548 F. 2d 879, 883 (10th Cir. 1977). By contrast, the revised model instruction given by the district court in the Spans' case is in no way ambiguous about the government's burden of proof. The Spans' argument on this issue is wholly unpersuasive.

B.

The Spans next argue that the district court erred by refusing to give jury instructions offered by the Spans on the right of a defendant to resist an arrest that is unlawful because it is not supported by probable cause. The district court rejected the instructions offered by defense counsel on the ground that such a right is no longer Ninth Circuit law following the Supreme Court's decision in United States v. Feola, 420 U.S. 671, 684, 43 L. Ed. 2d 541, 95 S. Ct. 1255 (1975). According to the district court, Feola overruled our decision in United States v. Moore, 483 F. 2d 1361 (9th Cir. 1973).

In Moore, we recognized that the right to resist an arrest not based on probable cause had come under criticism. We merely assumed that such a right still existed and that it constituted a defense to the charge of violating section 111. Moore, 483 F. 2d at 1364. Nonetheless, we held that any such right did not apply in Moore's case because the federal officers had probable cause to arrest him. Moore, 483 F. 2d at 1364. Moore's arrest was unlawful because it resulted from an unlawful search and not because federal officers did not have probable cause. Moore, 483 F. 2d at 1364-65. To the extent that any right of resisting an arrest not supported by probable cause still existed, we declined to extend that right to an arrest that was unlawful only in a derivative sense. Moore, 483 F. 2d at 1365. We noted, however, that we might take a different view in cases of "bad faith, unreasonable force, or provocative conduct by the arresting officer." Moore, 483 F. 2d at 1365.

We asked the parties to provide supplemental briefing on the question whether Feola overruled Moore. The Spans argue

that Feola could not overrule Moore because Feola did not address a situation involving resistance to an arrest not supported by probable cause. In their supplemental brief, the government argued for a much broader reading of Feola.

We agree with the Spans that Feola did not overrule Moore and did not consider the issue whether a person has a right to resist an arrest that is not based on probable cause. Moore, however, does not support a conclusion that the district court erred by refusing to give the instruction that the Spans requested.

Our holding in Moore did not depend on the notion that a person has a right to resist an arrest not supported by probable cause. The discussion on that issue was dictum. In addition, the language itself refers to the dearth of contemporary authority that supports the existence of such a right. Moore, 483 F. 2d at 1364 n.1, 1365. Even the dictum in Moore indicates that the right to resist an arrest that was not supported by probable cause is of doubtful validity today absent "bad faith, unreasonable force, or provocative conduct by the arresting officer." Moore, 483 F. 2d at 1365.

This more limited right of self-defense discussed in Moore is synonymous with the statutory requirement that a federal officer acting outside the scope of official duty is not entitled to the protections of section 111. See United States v. Danehy, 680 F. 2d 1311, 1316 (11th Cir. 1982) (per curiam) ("[T]here may be some residual role for the common law right [of resisting an unlawful arrest] where it appears that the arresting officer is engaged in a 'frolic of his own.'"); United States v. Martinez, 465 F. 2d 79, 82 (2d Cir. 1972) (some role for the right of resisting an unlawful arrest where the officer is on a personal frolic).[6] The instruction requested by the Spans did not rely on Moore for this more limited proposition. Rather, the

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6. For cases interpreting this statutory requirement, see United States v. Hohman, 825 F. 2d 1363 (9th Cir. 1987); United States v. Spears, 631 F. 2d 114 (9th Cir. 1980); United States v. Parker, 604 F. 2d 1327, 1329-30 (10th Cir. 1979) (citing cases); United States v. Reid, 517 F. 2d 953, 960 (2d Cir. 1975); Frizzi, 491 F. 2d at 1232.

Spans requested an instruction taken directly from the dictum in Moore.[7] On its face, Moore is weak authority indeed

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7. The Spans requested the following instructions asserting a broad right to resist any arrest not supported by probable cause:

> If the United States Marshals had no right to arrest, JERRY SPAN and/or DARLENE SPAN might resist the illegal attempt to arrest them, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest. One has an undoubted right to resist an unlawful arrest.
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> The privilege to resist an unlawful arrest is available only if the arrest was "unlawful."
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> In order for an arrest to be lawful it must be based upon probable cause.
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> Probable cause at the time of arrest is determined by examining whether at the moment the facts and circumstances within the Marshals' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. Suspicious conduct is not enough. Probable cause is lacking if the circumstances relied on are susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities.

for an obviously controversial proposition.

At most, Moore stands for the rule that an individual has a limited right to offer reasonable resistance to an arrest that is the product of an officer's personal frolic. Moore, 483 F. 2d at 1364-65. That right is not triggered by the absence of probable cause, but rather by the officer's bad faith or provocative conduct. Moore, 483 F. 2d at 1385. The instruction requested by the Spans did not state the law of our circuit, and was properly refused. See Kessi, 868 F. 2d at 1103 (a defendant is entitled to an instruction on any theory of defense that is supported by law and by the evidence presented at trial) (citing Sommerstedt, 752 F. 2d at 1496).

C.

The Spans next contend that the district court erred when it instructed the jury on the statutory requirement that a federal officer must be engaged in official duties to receive the protection of section 111. According to this argument, the court's instructions improperly directed the jury to find that the mar-

shals were in performance of their official duties as the statute requires. The Spans argue that the instructions foreclosed any possibility that the jury might find that Dains and Grotewold were on a personal frolic and that the Spans were therefore entitled to resist arrest in self-defense.

The district court instructed the jury that "[f]ederal officers engaged in good faith and colorable performance of their duties may not be forcibly resisted, even if the resistor turns out to be correct, that the resisted actions should not, in fact, have been taken. The statute requires him to submit peaceably and seek legal redress thereafter." Just before giving this instruction, the district court had also instructed the jury that "[a] deputy United States Marshal who is investigating leads in connection with a fugitive or trying to arrest a person is engaged in his official duties."

Defense counsel for the Spans objected to this instruction at the time it was given, and thereby preserved the record for appeal on this issue. We review the district court's instruction de

novo because this issue presents the question whether the elements of a statutory offense were accurately presented to the jury. Armstrong, 909 F. 2d at 1243 (quoting United States v. Spillone, 879 F. 2d 514, 525 (9th Cir. 1989), cert. denied, 111 S. Ct. 210, 112 L. Ed. 2d 170 (1990).

We agree with the Spans that the preferred course would have been to submit to the jury the question whether Marshals Dains and Grotewold were engaged in official duties. Cf. Frizzi, 491 F. 2d at 1232. In this case, however, we find that the district court's instructions were not reversible error.[8]

The instruction given was not a directed verdict on the question whether the marshals acted in good faith. The instruction states only that the activity of

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8. The record contains some confusion about whether the district court informed counsel in advance that it intended to give the disputed instruction. This is not grounds for reversal here because the instruction given was not reversible error, particularly in light of defense counsel's own failure to propose an isntruction stating that officers engaged in a personal frolic are not entitled to the protection of section 111.

looking for a suspect is official conduct. We find no error in the district court's instruction characterizing this aspect of the marshals' conduct as official duty. There was no factual dispute that the marshals were looking for a suspect when they approached the Spans, and the district court's characterization of that conduct as official duty is uncontroverted.

The crux of the Spans' critique of the district court's instruction turns on their argument that they defended themselves from the use of excessive force by Dains and Grotewold. According to this argument, the district court's instruction was error because it may have prevented the jury from acquitting the Spans even if it found that the Spans reasonably resisted excessive force by the marshals.

We do not find that the district court's instruction on this issue was error. As noted above, the instruction was not a directed verdict on the issue of good faith, and did not preclude acquittal based on an excessive force theory of defense. The district court's instruction stated that officers engaged in good faith performance of their duties may not be

forcibly resisted. An officer who uses excessive force is not acting in good faith. Contrary to the Spans' argument, the instruction does not require an arrestee to submit passively to an unprovoked beating.

On its own terms, the instruction does not foreclose acquittal based on an excessive force theory of defense. Even if it did, however, we would not find reversible error here because the Spans did not present this theory of their case at trial. The Spans have essentially asked us to find error in an instruction that they say precludes a theory of defense on which they did not rely at trial and for which they offered no instruction themselves. This we cannot do.

II. Destruction of Evidence

The Spans argue that the district court clearly erred by concluding that the marshals did not intentionally destroy evidence, and that the indictment against the Spans should have been dismissed as a result. Specifically, the Spans contend that the district court applied the wrong standard for evaluating evidence that Mar-

shal Dains destroyed a film canister belonging to Jerry Span's brother Peter.[9] We review the district court's findings on this issue for clear error. United States v. Weinstein, 834 F. 2d 1454, 1463 (9th Cir. 1987).

The Spans assert that at the time of their arrest, Marshal Dains grabbed a film canister from a witness and crushed it with the heel of his boot. The district court heard testimony from two defense witnesses and examined a photograph of the film canister allegedly destroyed.

The Spans focus their argument on an isolated portion of the trial transcript where the district court reviewed a photo of the film canister and stated that it could not tell "to a certainty" that it had been crushed in the manner asserted by the Spans. The remainder of the transcript indicates that the district court heard and considered all of the evidence

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9. We need not reach the issue whether the Spans suffered any prejudice as a consequence of the government's alleged destruction of evidence because the district court did not find that allegation credible.

presented before reaching a conclusion that the story lacked credibility.

We are not persuaded that the district court applied the wrong standard of proof or made factual findings that were clearly erroneous. The district court made a credibility determination that triers of fact are well-positioned to make. -See United States v. Vasquez, 858 F. 2d 1387, 1391 (9th Cir. 1988) (credibility determinations should be made by the trier of fact and reviewed for clear error), cert. denied, 488 U.S. 10324, 102 L. Ed. 2d 978, 109 S. Ct. 847 (1989), and cert. denied, 489 U.S. 1029, 109 S. Ct. 1161, 103 L. Ed. 2d 220 (1989). The district court's decision denying the Spans' motion to dismiss the indictment was not clearly erroneous.

III. The Jencks Act and Brady Rule

Finally, the Spans argue that the government violated the requirements of the Jencks Act, 18 U.S.C. § 3500,[10] and of

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10. Section 3500(b) provides that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . which relates to

the rule in Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), when it failed to turn over to defense counsel grand jury testimony by FBI Agent Petrie until after Petrie had been cross-examined. Defense counsel had requested all Jencks Act and Brady material before trial.

Petrie was the last government witness to testify. According to the Spans, the agent's grand jury testimony was crucial to impeaching the testimony of Marshals Dains and Grotewold. Apparently, Agent Petrie's grand jury testimony revealed some inconsistency in the trial testimony of Marshal Grotewold.

We will not reverse a conviction for Jencks Act error where the error is more likely than not harmless. United States v. Wallace, 848 F. 2d 1464, 1471 (9th Cir. 1988).[11] In this case, compliance with

(footnote cont'd)

the subject matter as to which the witness has testified."

11. A more stringent standard of harmlessness may apply in those situations where "denial of production of a Jencks Act type of statement might be a denial of a Sixth Amendment right. Where . . . the appellant's conviction rests heavily on

the Jencks Act would have required the government to turn over to defense counsel Petrie's grand jury testimony before Petrie was cross-examined. The government failed to do this until after Petrie completed all of his trial testimony. Counsel for the Spans also failed to bring to the court's attention the government's obligation to do so until after Petrie had been cross-examined. When counsel for the Spans did alert the court to the government's noncompliance with the Jencks Act, the district court ordered the government to turn over the material to defense counsel. The government complied with this order. In addition, the district court gave defense counsel the opportunity to recall Petrie for further cross-examination.[12] This minimized any

(footnote cont'd)

the credibility of a single accomplice, . . . the unproduced Jencks Material may well implicate confrontation clause or compulsory process issues." Wallace, 848 F. 2d at 1471 (internal citation omitted).

12. Counsel for the Spans elected not to recall the agent for additional cross-examination.

prejudice from the government's initial failure to produce Petrie's grand jury testimony.

Similarly, we do not find reversible error based on the rule of Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Under Brady, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87.

Our decision in United States v. Gordon, 844 F. 2d 1397 (9th Cir. 1988), is dispositive of the Spans' argument that a Brady violation by the government requires reversal of the convictions. In Gordon, we held that failure to disclose allegedly material evidence may not be prejudicial so long as it occurs "at a time when disclosure would be of value to the accused." Gordon, 844 F. 2d at 1403 (internal quotation omitted).

Here, the district court's rulings ensured that the requirements of Gordon were met. Moreover, any prejudice caused

by delayed disclosure was mitigated by the district court's decision to allow the Spans to recall Petrie to the stand if they chose to do so.

CONCLUSION

The district court's instructions to the jury were not reversible error in light of the case presented by the Spans at trial. Furthermore, the district court did not err in denying the Spans' motion to dismiss the indictment based on the government's alleged bad faith destruction of evidence. Finally, the Spans' contentions of Jencks Act and Brady rule violations do not merit reversal of the Spans' convictions.

The convictions of Jerry Span and Darlene Span are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 90-10284

JERRY SPAN,
Defendant-Appellant. D.C. No. CR-89-00284-RCB

UNITED STATES OF AMERICA,
Plaintiff-Appellee, O R D E R

v. No. 90-10285

DARLENE SPAN,
Defendant-Appellant.

(Filed: December 3, 1992)

Before: SKOPIL, PREGERSON, and O'SCANNLAIN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.